UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--X
ARMANDO CAZAREZ,

Plaintiff,

-against-

ATLANTIC FARM & FOOD INC. doing Business as ATLANTIC FARM & FOOD MARKET, GURCHARN SINGH, and TARLOCHAN SINGH,

Defendants.
--X

REPORT AND RECOMMENDATION

15 CV 2666 (CBA)(RML)

LEVY, United States Magistrate Judge:

By order dated December 5, 2016, the Honorable Carol Bagley Amon, United States District Judge, referred plaintiff's motion for a default judgment to me for a report and recommendation. I conducted an inquest hearing on February 3, 2017. (See Transcript of Hearing, dated Feb. 3, 2017 ("Tr."), Dkt. No. 36.) For the reasons stated below, I respectfully recommend that plaintiff's motion be granted and that plaintiff be awarded $42,697.31, plus prejudgment and post-judgment interest.

BACKGROUND AND FACTS

Plaintiff Armando Cazarez[1] ("plaintiff" or "Cazarez") commenced this action on May 8, 2015, asserting claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, and the New York Labor Law ("NYLL"), N.Y. LAB. LAW §§ 190, *et seq.*, 650, *et seq.* (See generally Complaint, dated May 8, 2015 ("Compl."), Dkt. No. 1.) Defendants own and operate a fruit and vegetable market at 114-15 Atlantic Avenue in Richmond Hill, New York, at which plaintiff was employed as a stocker from December 2012 to April 2015. (Id. ¶¶ 5, 8.) Plaintiff alleges that defendants failed to pay him overtime wages when he worked more than forty hours in a workweek. (Id. ¶¶ 14-15, 25, 32.) He also alleges that he never received wage notices or wage statements in compliance with the NYLL. (Id. ¶¶ 36-37.) He seeks an award of unpaid overtime wages, plus liquidated damages and interest, as well as statutory damages for defendants' failure to provide wage notices and wage statements, and attorney's fees and costs. (See id. at 8; Updated Damages Calculations ("Updated Calculations"), annexed as Ex. A to the Letter of Lillian M. Marquez, Esq., dated Feb. 3, 2017, Dkt. No. 35.)

---

[1] Although the complaint spells plaintiff's surname "Cazares," at the inquest hearing on February 3, 2017, plaintiff clarified that the correct spelling is "Cazarez." (See Tr. at 5.) The caption has therefore been amended to correct that error.

Defendants initially answered the complaint. (See Answer, dated Feb. 5, 2016 ("Answer"), Dkt. No. 13.) However, in May 2016, defendants' counsel withdrew, citing defendants' "continuous lack of cooperation and failure to participate in their defense." (See Declaration of Arthur H. Forman, Esq., dated May 17, 2016, Dkt. No. 17-1, ¶ 3; Order, dated May 23, 2016.) Thereafter, defendants failed to appear for scheduled court conferences or to retain counsel for the corporate defendant, despite repeated warnings that their failure to do so would result in a recommendation that default judgments be entered against them. (See Minute Entries dated Aug. 2, 2016, Sept. 7, 2016, and Oct. 6, 2016.) On November 10, 2016, the Clerk of the Court entered a certificate of default against all defendants (Certificate of Default, dated Nov. 10, 2016, Dkt. No. 27), and on December 5, 2016, plaintiff moved for a default judgment. Judge Amon referred that motion to me. (See Order, dated Dec. 5, 2016.)

On December 13, 2016, I issued an order scheduling an in-person inquest hearing for February 3, 2017 at 3:00 p.m. My order directed plaintiff's counsel "to notify defendants of the date and time of the scheduled hearing by first class mail to each defendant's last known address." (See Order, dated Dec. 13, 2016.) A hard copy of my order was also mailed to defendants at 114-15 Atlantic Avenue, Richmond Hill, New York 11418. Defendants did not appear for the hearing or contact the court or plaintiff's counsel before or after. In light of their willful failure to appear and defend this case, I respectfully recommend that plaintiff's motion be granted with respect to all defendants.

DISCUSSION

A. Legal Standard

It is firmly established that a party's default "is deemed to constitute a concession of all well pleaded allegations of liability . . . ." Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (citing Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974)); see also Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981). Nonetheless, "it remains the plaintiff's burden to demonstrate that those uncontroverted allegations, without more, establish the defendant's liability on each asserted cause of action." Gunawan v. Sake Sushi Rest., 897 F. Supp. 2d 76, 83 (E.D.N.Y. 2012) (collecting cases); see also Au Bon Pain, 653 F.2d at 65 (explaining that the district court "need not agree that the alleged facts constitute a valid cause of action.").

Furthermore, a party's default "is not considered an admission of damages." Greyhound, 973 F.2d at 158 (citing Flaks, 504 F.2d at 707); see also Au Bon Pain, 653 F.2d at 65 ("[A]t the inquest, the court should have accepted as true all of the factual allegations of the complaint, except those relating to damages."). Therefore, "[i]f the defaulted complaint suffices to establish liability, the court must conduct an inquiry sufficient to establish damages to a 'reasonable certainty.'" Gunawan, 897 F. Supp. 2d at 83 (quoting Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999)). Additionally, because it is the employer's obligation to maintain employment records, "[w]hen a defendant defaults in an action brought under the FLSA, the plaintiff's recollection and estimates of hours are presumed to be correct." Id. (citing Chun Jie Yin v. Kim, No. 07 CV 1236, 2008 WL 906736, at *3 (E.D.N.Y. Apr. 1, 2008); see also Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946).

B. Liability

Plaintiff asserts one claim for unpaid overtime compensation under the FLSA, 29 U.S.C. § 207(a). (See Compl. ¶¶ 1, 22-28) Plaintiff also brings claims pursuant to the NYLL for: (1) unpaid overtime compensation, N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2; and (2) failure to furnish wage notices and wage statements, N.Y. LAB. LAW §§ 195(1), (3). (Compl. ¶¶ 29-39.)

1. FLSA

In order to be held individually liable under the FLSA, defendants Gurcharn Singh and Tarlochan Singh must be "employers" within the broad meaning of 29 U.S.C. § 203(d). See Fermin v. Las Delicias Peruanas Rest. Inc., 93 F. Supp. 3d at 19, 35-37 (E.D.N.Y. 2015). In Carter v. Dutchess Community College, 738 F.2d 8, 12 (2d Cir. 1984), the Second Circuit Court of Appeals set forth a series of non-exclusive "economic reality" factors to assist in evaluating whether an employment relationship exists. These relevant factors include whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Carter, 738 F.2d at 12; see also Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999).

In the complaint, plaintiff alleges that Gurcharn Singh and Tarlochan Singh both exercised sufficient control over the business and over plaintiff's pay and work schedules to be considered plaintiff's employers. (Compl. ¶¶ 10, 11.) In their answer, defendants admitted that they were plaintiff's employers. (Answer ¶¶ 10, 11.) Thus, plaintiff has established defendants' liability as employers pursuant to the FLSA. See Fermin, 93 F. Supp. 3d at 36.

Further, in order to establish the corporate defendant's liability under the FLSA, plaintiff must sufficiently allege that Atlantic Farm & Food Inc. was an "enterprise engaged in commerce or in the production of goods for commerce" within the applicable statutory definition, 29 U.S.C. § 203(s)(1). Plaintiff alleges that Atlantic Farm & Food Market was "engaged in commerce or in the production of goods for commerce and handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce" and "had an annual gross volume of sales in excess of $500,000" during the relevant time period. (Compl. ¶ 9.) In their answer, defendants admitted the truth of this allegation. (See Answer ¶ 9.) Plaintiffs have therefore established the corporate defendant's liability, and I conclude that plaintiff's complaint asserts a viable claim against all defendants under the FLSA.

1. NYLL

It is well established that the NYLL "mirrors the FLSA in most aspects, including its wage and overtime compensation provisions." Jemine v. Dennis, 901 F. Supp. 2d 365, 375 (E.D.N.Y. 2012); see also Gunawan, 897 F. Supp. 2d at 84-85. Thus, "[c]ourts have interpreted the definition of 'employer' under the NYLL coextensively with the definition used by the FLSA." Fermin, 93 F. Supp. 3d at 37 (internal quotation marks and citations omitted). Unlike the FLSA, however, the NYLL does not require plaintiffs to show a nexus with interstate commerce or that the employer has any minimum amount of sales. See Kim v. Kum Gang, Inc., No. 12 CV 6344, 2015 WL 2222438, at *22 (S.D.N.Y. Mar. 19, 2015). Accordingly, for the reasons explained supra, I find that plaintiff has established defendants' liability pursuant to the NYLL's overtime compensation provision.

C. Damages

1. Unpaid Wages and Overtime

As explained, "when an employer fails to maintain accurate records or where, as here, no records have been produced as a consequence of a defendant's default, courts have held that the plaintiff's recollection and estimates of hours worked are presumed to be correct." Gunawan, 897 F. Supp. 2d at 88 (internal marks and citations omitted); see also Kim, 2015 WL 2222438, at *25 (explaining that, where an employer fails to maintain records of wages and hours, plaintiffs "need only prove that they performed work for which they were not properly compensated and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference") (internal quotation marks and citations omitted); Hart v. Rick's Cabaret Int'l, Inc., 60 F. Supp. 3d 447, 466 (S.D.N.Y. 2014) ("It would be manifestly unfair to allow employers to avoid, or reduce, their liability simply because they kept shoddy records.").

Plaintiff is entitled to overtime compensation under both the FLSA and NYLL at the rate of one and one-half times his regular rate of pay for the hours he worked in excess of forty during a workweek. See 29 U.S.C. § 207(a)(1); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2. At the inquest hearing, plaintiff testified that he worked at Atlantic Farm & Food Market from December 12, 2012 to April 2015 and was paid weekly in cash. (Tr. at 5-6, 9.) For most of his employment there, he worked sixty hours per week.[2] He stated that he never took a

[2] Plaintiff testified that, over the course of his employment at Atlantic Farm & Food Market, he had three different work schedules. For three months, he worked from 5:00 a.m. to 3:30 p.m., six days per week, for a total of sixty-three hours per week. (Tr. at 7; see also Updated

(continued…)

sick day or time off for vacation, and was never given more than a fifteen-minute break. (Id. at 8-9, 17.) When he started working there, he was paid $450 per week. (Id. at 9; see also Updated Calculations.) After four months, defendants increased his pay to $500 per week. (Id. at 10; see also Updated Calculations.) Finally, in August 2013, his pay increased again to $530 per week. (Updated Calculations.) Plaintiff testified that he was paid by defendant Tarlochan Singh, who directly supervised his work. (Tr. at 12.)

In order to calculate the unpaid wages due to plaintiff, I must first determine his regular hourly rate. "If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay . . . is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113; see Chopen v. Olive Vine, Inc., No. 12 CV 2269, 2015 WL 1514390, at *6 (E.D.N.Y. Mar. 13, 2015), adopted in pertinent part by 2015 WL 1542082 (E.D.N.Y. Mar 31, 2015); Santillan v. Henao, 822 F. Supp. 2d 284, 295 (E.D.N.Y. 2011). The regular hourly rate "must be drawn from what happens under the employment contract." 29 C.F.R. § 778.108. '"In the absence of any written instrument memorializing the parties' intentions, the Court must infer the terms of their agreement from the entire course of their conduct, based on the testimonial and documentary evidence in the record.'" Chopen, 2015 WL 1514390, at *6 (quoting Moon v. Kwon, 248 F. Supp. 2d 201, 206 (S.D.N.Y. 2002)).

In this case, where plaintiff's work schedule was relatively constant, it is reasonable to infer from their course of conduct that the parties intended for plaintiff's weekly salary to include straight time pay for each hour worked. See, e.g., Peralta v. M & O Iron Works, Inc., No. 12 CV 3179, 2014 WL 988835, at *8 (E.D.N.Y. Mar. 12, 2014) (calculating

---

Calculations.) For thirteen weeks, he worked from 7:00 a.m. to 5:00 p.m., six days per week, for a total of sixty hours per week. (Tr. at 7-8, 9; see also Updated Calculations.) And for the last ninety-seven weeks of his employment there, he worked from 8:00 a.m. to 6:00 p.m., six days per week, for a total of sixty hours per week. (Tr. at 6-7; see also Updated Calculations.)

plaintiff's regular hourly rate based on a fifty-six–hour workweek because plaintiff regularly worked fifty-six hours per week); Man Wei Shiu v. New Peking Taste Inc., No. 11 CV 1175, 2014 WL 652355, at *12 (E.D.N.Y. Feb. 19, 2014) (calculating plaintiffs' regular hourly rate based on a sixty-seven hour workweek and rejecting plaintiffs' calculations based on a forty hour workweek); Llolla v. Karen Gardens Apartment Corp., No. 12 CV 1356, 2014 WL 1310311, at *10 (E.D.N.Y. Mar. 10, 2014), adopted as modified by 2014 WL 1311773 (E.D.N.Y. Mar. 28, 2014) ("Although an employer may choose to pay an employee on a weekly basis, 'an employee's regular rate is nevertheless an hourly rate of pay, determined by dividing the employee's weekly compensation by the number of hours for which that compensation [was] intended.'") (quoting Moon, 248 F. Supp. 2d at 230); Hernandez v. P.K.L. Corp., No. 12 CV 2276, 2013 WL 5129815, at *4 (E.D.N.Y. Sept. 12, 2013) (determining hourly rate of pay by dividing weekly compensation by the total number of hours worked per week).

Therefore, I have calculated plaintiff's regular hourly rate by dividing his weekly salary by the total number of hours he worked that week.[3] For the twelve weeks that plaintiff

---

[3] Plaintiff calculated the regular hourly rate based on the assumption that the weekly salary he received compensated only the first forty hours worked per week. (See Memorandum of Law in Support of Plaintiff's Motion for Default Judgment, dated Nov. 21, 2016. Dkt. No. 31, at 12; Updated Calculations.) There is support for using that method, which results in a higher hourly rate, and therefore a higher overtime premium rate. See Giles v. City of New York, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999) (explaining that when an employee is paid a weekly salary, "[t]here is a rebuttable presumption that [the] weekly salary covers 40 hours" but that the employer "can rebut the presumption by showing an employer-employee agreement that the salary cover[s] a different number of hours" that "include[s] overtime hours at the premium rate."); see also Berrios v. Nicholas Zito Racing Stable, Inc., 849 F. Supp. 2d 372, 385 (E.D.N.Y. 2012) ("'Unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime, but instead hold that weekly salary covers only the first 40 hours.'") (quoting Giles, 41 F. Supp. 2d at 317); Jiao v. Shi Ya Chen, No. 03 CV 165, 2007 WL 4944767, at *13 (E.D.N.Y. Mar. 30, 2007) ("There is a rebuttable presumption that an employer's payment of a weekly salary represents compensation for the first 40 hours of an employee's work-week; the burden is on the employer to rebut this presumption with evidence

(continued…)

was paid $450 and worked sixty-three hours, his regular hourly rate of pay was $7.14.[4] For the four weeks that plaintiff was paid $450 and worked sixty hours, his regular hourly rate of pay was $7.50. For the eighteen weeks that plaintiff was paid $500 and worked sixty hours, his regular hourly rate of pay was $8.33. And for the eighty-eight weeks that plaintiff was paid $530 and worked sixty hours, his regular hourly rate of pay was $8.83. This results in an award of $11,393.36, as follows:[5]

Time period	# of weeks worked	# of hours worked per week	# of overtime hours worked per week	Hourly pay rate	Overtime pay rate	Amount paid per week	Unpaid wages owed
12/1/12 - 12/31/12	4	63	23	$7.25	$10.88	$450	$360.96
1/1/13 – 2/28/13	8	63	23	$8.00	$12.00	$450	$1168.00

---

that the employer and employee had an agreement that the employee's weekly compensation would cover a different number of hours.") (citing Giles, 41 F. Supp. 2d at 317).

However, more recent cases have rejected that approach and instead divided the employee's weekly salary by the total number of hours worked each week. See, e.g., .Zurita v. High Definition Fitness Ctr., Inc., No. 13 CV 4394, 2016 WL 3619527, at *5 (E.D.N.Y. June 9, 2016), adopted by, 2016 WL 3636020 (E.D.N.Y. June 29, 2016); Chopen, 2015 WL 1514390, at *6. I find the reasoning of these cases more persuasive.

[4] For the first four weeks of plaintiff's employment, from December 1, 2012 to December 31, 2012, the New York State Minimum Wage was $7.25. N.Y. LAB. LAW § 652(1). On December 31, 2013, the minimum wage increased to $8.00. Id. On December 31, 2014, it increased to $8.75, and on December 31, 2015, it increased to $9.00. Id. Thus, there were periods when plaintiff was receiving less than minimum wage. In calculating plaintiff's underpayment, I have used either plaintiff's regular hourly rate or the minimum hourly wage, whichever is higher. Although plaintiff did not explicitly plead a minimum wage claim, I respectfully recommend that defendants be ordered to compensate plaintiff for unpaid minimum wages, to which he is entitled.

[5] I note that the statute of limitations for a claim for unpaid overtime compensation under the FLSA is two years after the claim accrued, unless the FLSA violation was willful, in which case the statute of limitations is three years. See 29 U.S.C. § 255(a). In his complaint, plaintiff alleges that defendants willfully violated the FLSA by knowingly and intentionally failing to pay plaintiff overtime wages. (See Compl. ¶ 27.) The statute of limitations for a wage claim under the NYLL is six years. See N.Y. LAB. LAW §§ 198(3), 663(3), 681(3). Plaintiff commenced this action on May 8, 2015, less than three years after the start of his employment. His claims therefore fall within the applicable statutes of limitations.

3/1/13 - 3/31/13	4	60	20	$8.00	$12.00	$450	$440.00
4/1/13 – 7/31/13	18	60	20	$8.33	$12.50	$500	$1497.60
8/1/13 – 12/31/13	22	60	20	$8.83	$13.25	$530	$1940.40
1/1/14 – 12/31/14	52	60	20	$8.83	$13.25	$530	$4586.40
1/1/15 – 4/12/15	14	60	20	$9.00	$13.50	$530	$1400
						TOTAL:	**$11,393.36**

2. Liquidated Damages

Plaintiff requests liquidated damages under the NYLL.[6] See N.Y LAB. LAW §§ 198(1–a), 663(1). Pursuant to the NYLL, a prevailing employee is entitled to liquidated damages in the amount of one-hundred percent of unpaid wages accrued unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law. N.Y. LAB. LAW §§ 198(1–a), 663(1). Under the NYLL, "liquidated damages are presumed unless defendants can show subjective good faith." Zubair v. EnTech Eng'g, P.C., 900 F. Supp. 2d 355, 360 n.3 (S.D.N.Y. 2012). As defendants have defaulted, they have not established good faith to rebut the liquidated damages presumption. I therefore recommend that plaintiff be awarded $11,393.36 in liquidated damages.

3. Prejudgment Interest

Plaintiff also requests and is entitled to prejudgment interest under the NYLL. See N.Y. LAB. LAW § 663; Fermin, 93 F. Supp. 3d at 48 ("In contrast to the FLSA, the NYLL permits an award of both liquidated damages and pre-judgment interest.") '"Prejudgment interest is calculated on the unpaid wages due under the NYLL, not on the liquidated damages awarded under the state law.'" Fermin, 93 F. Supp. 3d at 49 (quoting Mejia v. East Manor USA

---

[6] The FLSA and NYLL provide for essentially identical remedies with respect to liquidated damages. Thus, a plaintiff cannot recover liquidated damages under both statutes. Chowdhury v. Hamza Express Food Corp., 666 F. App'x 59, 61 (2d Cir. 2016) (summary order).

Inc., No. 10 CV 4313, 2013 WL 3023505, at *8 n.11 (E.D.N.Y. Apr. 19, 2013), adopted by 2013 WL 2152176 (May 17, 2013)) (internal brackets removed).

The statutory rate of interest is nine percent per annum. N.Y. C.P.L.R. § 5004. Where damages were incurred at various times, interest may be calculated from a single reasonable intermediate date. N.Y. C.P.L.R. § 5001(b). The midpoint of a plaintiff's employment is a reasonable intermediate date for purposes of calculating prejudgment interest. See Jaramillo v. Banana King Rest. Corp., No. 12 CV 5649, 2014 WL 2993450, at *8 (E.D.N.Y. June 30, 2015); Fermin, 93 F. Supp. 3d at 49. I determine the midpoint of Cazarez's employment to be February 4, 2014. Accordingly, I respectfully recommend that Cazarez be awarded prejudgment interest on his compensatory damages of $11,393.36, calculated at a rate of nine percent per annum from February 4, 2014 to the date that judgment is entered.

4. Spread of Hours

N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4 prescribes that "[a]n employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which [ ] the spread of hours exceeds 10 hours." N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4. Although plaintiff has not requested unpaid spread-of-hours premiums, there was a period during which he was working in excess of ten hours per day and earning less than minimum wage. From December 1, 2012 to February 28, 2013, plaintiff worked from 5:00 a.m. to 3:30 p.m., for a total of 10.5 hours per day, six days per week. He received $450 per week during that time frame. (See Updated Calculations.) He therefore is entitled to one extra hour's pay at the minimum hourly wage rate for each of those work days. For four of those weeks (or twenty-four work days), the minimum wage was $7.25; for eight of those weeks (or forty-eight work days), the minimum wage was

$8.00. I therefore recommend that plaintiff be awarded $558 in spread of hours premiums (24 x $7.25 + 48 x $8.00).

5. Statutory Penalties Under the Wage Theft Prevention Act

Plaintiff states that he never received wage notices or wage statements in compliance with the NYLL. (See Compl. ¶¶ 36, 37; see also Tr. at 12.) Beginning April 9, 2011, New York's Wage Theft Prevention Act ("WTPA") required employers to provide written wage notices "at the time of hiring, and on or before February first of each subsequent year of the employee's employment with the employer." N.Y. LAB. LAW § 195(1-a) (eff. Apr. 9, 2011 to Feb. 27, 2015). By an amendment to the WTPA, that provision changed, effective February 27, 2015, to one that required employers to provide written wage notices only "at the time of hiring." 2014 N.Y. Laws ch. 537 § 1, amending N.Y. LAB. LAW § 195(1-a). Throughout, the WTPA has required the wage notice to be "in English and in the language identified by each employee as the primary language of such employee," id., and to contain the following information:

> (1)the rate or rates of pay and basis thereof; (2) allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; (3) the regular pay day designated by the employer; (4) the employer's name; (5) any 'doing business as' names used by the employer; (6) the physical address of the employer's main office or principal place of business, and a mailing address if different; (7) the employer's telephone number; and (8) such other information as the commissioner deems material and necessary.

Cabrera v. 1560 Chirp Corp., No. 15 CV 8194, 2017 WL 1289349, at *7 (S.D.N.Y. Mar. 6, 2017), adopted by 2017 WL 1314123 (S.D.N.Y. Apr. 6, 2017); see also 2014 N.Y. Laws ch. 537 § 1, amending N.Y. LAB. LAW § 195(1-a). Prior to February 27, 2015, "the WTPA entitled employees to recover statutory damages for wage notice violations of $50 per work week, not to exceed $2,500." Baltierra v. Advantage Pest Control Co., No. 14 CV 5917, 2015 WL 5474093, at *11 (S.D.N.Y. Sept. 18, 2015); see also 2010 N.Y. Laws ch. 564 § 7, amending N.Y. LAB. LAW § 198(1-b). Plaintiff requests $2,500 for this violation (Memorandum of Law in Support of Plaintiff's Motion for Default Judgment, dated Nov. 21, 2016 ("Pl.'s Mem."), Dkt. No. 31, at 13), and I respectfully recommend that the request be granted.

With respect to damages for defendants' failure to provide wage statements, as of April 9, 2011, employers are required to

> 'furnish each employee with a statement with every payment of wages, listing the following' information: (1) the dates of work covered by that payment of wages; (2) the employee's name; (3) the employer's name, address, and telephone number; (4) the rate or rates of pay and basis thereof; (5) gross wages; (6) deductions; (7) allowances, if any, claimed as part of the minimum wage; and (8) net wages.

Salinas v. Starjem Rest. Corp., No. 13 CV 2992, 2015 WL 4757618, at *13 (S.D.N.Y. Aug. 12, 2015) (quoting N.Y. LAB. LAW § 195(3)); see also Baltierra, 2015 WL 5474093, at *10-11.

Prior to February 27, 2015, "the WTPA entitled employees to recover statutory damages for violations of the wage statement requirement of $100 per work week, not to exceed $2,500." Baltierra, 2015 WL 5474093, at *10 (citation omitted); accord Inclan v. New York Hosp. Grp., Inc., 95 F. Supp. 3d 490, 501 (S.D.N.Y. 2015); see also 2010 N.Y. Laws ch. 564 § 7, amending N.Y. LAB. LAW § 198(1-d). By an amendment to the WTPA effective February 27, 2015, the law changed to allow employees to recover wage-statement statutory damages of $250 dollars "for each work day that the violations occurred or continue to occur," not to exceed $5,000. 2014 N.Y. Laws ch. 537 § 2, amending N.Y. LAB. LAW § 198(1-d); see also Zhang v. Red Mtn. Noodle House Inc., No. 15 CV 628, 2016 WL 4124304, at *6 n.13 (E.D.N.Y. July 5, 2016), adopted by 2016 WL 4099090 (Aug. 2, 2016). Because plaintiff worked more than twenty days after the WTPA amendment went into effect, I respectfully recommend that plaintiff be awarded the statutory maximum of $5,000.

6. Post-judgment Interest

Plaintiff also requests and is entitled to an award of post-judgment interest. (See Pl's Mem. at 15.) 28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). Under the statute, interest is calculated "from the date of the entry of judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[ ] the date of the judgment" Id. Thus, I respectfully recommend that plaintiff be awarded statutory post-judgment interest. See Fermin, 93 F. Supp. 3d at 53 (finding that post-judgment interest is mandatory).

7. Attorney's Fees & Costs

a. Fees

Plaintiff requests an award of $17,160 in attorney's fees. (See Pl.'s Mem. at 16.) Both the FLSA and NYLL provide for recovery of reasonable attorney's fees. See 29 U.S.C. § 216(b); N.Y. LAB. LAW § 663. An application for attorney's fees must be supported by "contemporaneous time records" that "specify, for each attorney, the date, the hours expended, and the nature of the work done." New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983). Plaintiff's counsel has complied with this requirment. (See Declaration of Louis Pechman, Esq., dated Nov. 21, 2016 ("Pechman Decl."), Dkt. No. 32, Ex. C.)

In calculating a fee award, the court must first establish a reasonable hourly rate, which is "what a reasonable, paying client would be willing to pay." Arbor Hill Concerned

Citizens Neighborhood Ass'n v. Cty. of Albany, 522 F.3d 182, 184 (2d Cir. 2008). "The reasonable hourly rates should be based on "rates prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." Cruz v. Local Union No. 3 of IBEW, 34 F.3d 1148, 1159 (2d Cir. 1994) (citing Blum v. Stenson, 465 U.S. 886, 894 (1984)). "Courts have broad discretion to assess the reasonableness of each component of a fee award." Jaramillo, 2014 WL 2993450, at *8 (citing Siemieniewicz v. CAZ Contracting Corp., No. 11 CV 704, 2012 WL 5183375, at *15 (E.D.N.Y. Sept. 21, 2012), adopted as modified by 2012 WL 5183000 (E.D.N.Y. Oct. 18, 2012)).

Plaintiff's law firm, Pechman Law Group PLLC ("PLG"), requests hourly rates of $600 for attorney Louis Pechman, $400 for attorney Lillian M. Marquez, and $300 for attorney Vivianna Morales. (See Pechman Decl. ¶¶ 43, 49, 50.) Mr. Pechman graduated from law school in 1983 and has specialized in labor and employment law for over thirty years, handling hundreds of wage and hour cases. (Id. ¶ 44.) Based on my review of the rates awarded in this district to lawyers of similar experience in relatively straightforward wage and hour defaults, I respectfully recommend that Mr. Pechman's hourly rate be reduced to $400. Plaintiff cites no case law in this district, and this court's research uncovered none, awarding a higher hourly rate in an FLSA/NYLL case. See, e.g., Encalada v. Baybridge Enters. Ltd., 612 F. App'x 54 (2d Cir. 2015) (upholding district court decision that "survey[ed] attorneys' fees decisions in [the Eastern District of New York in] contested FLSA fee applications . . . , and found that the highest litigated reasonable rate in a simple FLSA case is $350."), cert. denied, 136 S. Ct. 1714 (2016); Griffin v. Astro Moving & Storage Co. Inc., No. 11 CV 1844, 2015 WL 1476415, at *8 (E.D.N.Y. Mar. 31, 2015) ($400 per hour held reasonable for law firm partner with twenty-seven years of employment litigation experience).

Ms. Marquez received her J.D. degree in 2011 and served as a court attorney and federal law clerk for approximately five years before joining PLG as an associate in September 2016. (Pechman Decl. ¶ 49.) Attorneys with her level of experience and skill are typically awarded hourly rates in the range of $225 to $250. See, e.g., Lopez v. PMMT Inc., No. 14 CV 2057, 2016 WL 7633264, at *15 (E.D.N.Y. Aug. 25, 2016), adopted by 2017 WL 27943 (E.D.N.Y. Jan. 3, 2017) (reducing hourly rate of attorney with six years of experience to $225); Li v. Leung, No. 15 CV 5262, 2016 WL 5369489, at *21 (E.D.N.Y. June 10, 2016), adopted as modified on other grounds, 2016 WL 5349770 (E.D.N.Y. Sept. 23, 2016) (awarding hourly rate of $250 to associate with nine years of experience); Herrera v. Tri-State Kitchen & Bath, Inc., 14 CV 1695, 2015 WL 1529653, at *14-15 (E.D.N.Y. Mar. 12, 2015) (awarding associate with eight years of experience $250 per hour in FLSA and NYLL default judgment matter); Man Wei Shiu v. New Peking Taste, Inc., No. 11 CV 1175, 2013 WL 2351370, at *13 (E.D.N.Y. May 28, 2013) (awarding $275 hourly rate to an attorney with ten years' experience in FLSA cases and $225 to a mid-level associate); see also Galeana v. Lemongrass on Broadway Corp., 120 F. Supp. 3d 306, 324 (S.D.N.Y. 2014) (awarding $250 per hour to junior associate with eight years of experience handling FLSA claims). I therefore recommend that Ms. Marquez's rate be reduced to $250 per hour.

Ms. Morales received her J.D. degree in 2013 and has worked as an associate at PLG since then. Reasonable hourly rates for junior attorneys generally range between $150 and $200. See Mahoney v. Amekk Corp., No. 14 CV 4131, 2016 WL 6585810, at *18-19 (E.D.N.Y. Sept. 30, 2016), adopted by 2016 WL 6601445 (E.D.N.Y. Nov. 7, 2016) (reducing hourly rate of attorney admitted in 2014 to $150); Koszkos v. Janton Indus., Inc., No. 15 CV 1700, 2016 WL 4444329, at *8 (E.D.N.Y. Aug. 3, 2016), adopted by 2016 WL 4444782 (E.D.N.Y. Aug. 23,

2016) (reducing hourly rates to $200 and $175, respectively, for attorneys with five and two years of experience); Herrera, 2015 WL 1529653, at *14-15 (awarding attorney admitted in 2012 $175 per hour in wage and hour default); Gomez v. El Rancho de Andres Carne de Tres, 12 CV 1264, 2014 WL 1310296, at *11 (E.D.N.Y. Mar. 11, 2014), adopted by 2014 WL 1310299 (E.D.N.Y. Mar. 31, 2014) (collecting cases and stating that "[c]ourts have recently recognized that the prevailing hourly rate for junior associates in this district generally is between $100 and $200."). I therefore recommend that Ms. Morales's hourly rate be reduced to $200.

Next, the court must assess whether the hours expended by plaintiff's counsel were reasonable, and exclude any hours that were excessive, redundant, or otherwise unnecessary to the litigation. See Jaramillo, 2014 WL 2993450, at *9; Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The records reflect a total of 47.5 hours of attorney time incurred meeting with the client, investigating the case, drafting the complaint, attempting to contact the defendants (who initially defended the action), corresponding with the court, and drafting the default judgment motion and supporting documentation. (See Pechman Decl., Ex. C.) After a review of the records and case law, I find the number of hours spent to be reasonable. See, e.g., Cortes v. Warb Corp., No. 14 CV 7562, 2016 WL 1266596, at *6 (E.D.N.Y. Mar. 15, 2016), adopted by 2016 WL 1258484 (E.D.N.Y. Mar. 30, 2015) ("Generally, the high-end amount of hours spent on cases in a similar procedural posture is no more than 55 hours total.") (internal marks and citation omitted). Accordingly, I respectfully recommend that plaintiffs be awarded $11,205 in attorney's fees (5 hours for Mr. Pechman at $400 per hour + 14.1 hours for Ms. Marquez at $250 per hour + 28.4 hours for Ms. Morales at $200 per hour).

b. Costs

Finally, plaintiff requests $647.59 in costs. (See Pl's. Mem. at 16.) Both the FLSA and NYLL provide for recovery of costs. 29 U.S.C. § 216(b); N.Y. LAB. LAW §§ 198(4), 663(1). "[O]nly those costs that are tied to identifiable, out-of-pocket disbursements are recoverable." Jemine, 901 F. Supp. 2d at 393 (internal quotation marks and citation omitted). Plaintiff's costs consist of $400 for the court's filing fee, $156 for service of process, and $91.59 in mailing fees. (See Pechman Decl. ¶ 54). I find this amount to be reasonable and therefore recommend that plaintiff be awarded $647.59 in costs.

CONCLUSION

For the reasons set forth above, I respectfully recommend that plaintiff's motion be granted and that default judgments be entered against all defendants, jointly and severally. Regarding damages, I recommend that plaintiff be awarded $30,844.72, consisting of $11,393.36 in unpaid compensation, $11,393.36 in liquidated damages under state law, $558 in spread of hours premiums, $2,500 in statutory penalties for wage notice violations, and $5,000 in statutory penalties for wage statement violations. I further recommend that plaintiff be awarded prejudgment interest on his compensatory damages of $11,393.36, calculated at a rate of nine percent per annum from February 4, 2014 to the date of entry of judgment, as well as post-judgment interest. Finally, I respectfully recommend that plaintiff be awarded $11,205 in attorney's fees and $647.59 in costs.

Plaintiff's counsel is directed to serve copies of this Report and Recommendation on defendants upon receipt. Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with courtesy copies to Judge Amon and to my chambers, within fourteen (14) days. Failure to file objections within the specified time waives the right to appeal the district court's order. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

Respectfully submitted,

/s/

ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
May 17, 2017